

NO. 77-6910

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

BENSON JOSEPH DONOHO, PETITIONER

-v-

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Benson Joseph Donoho, pursuant to Rule 53, Supreme Court Rules, and Title 18 U.S.C. §3006A(d)(6), respectfully moves this Honorable Court for leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel undersigned was appointed by the United States District Court for the District of Arizona to represent the petitioner for purposes of appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: June 8, 1978.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

BENSON JOSEPH DONOHO, PETITIONER

-v-

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BENSON JOSEPH DONOHO
Petitioner

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, Benson Joseph Donoho requests that a writ of certiorari issue to review the May 12, 1978, opinion of the United States Court of Appeals for the Ninth Circuit, San Francisco, California (Docket #77-1999), affirming the judgment of conviction of the petitioner by the United States District Court for the District of Arizona, Phoenix, Arizona.

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Ninth Circuit, No. 77-1999, May 12, 1978, is attached and hereinafter referred to as Appendix I.

JURISDICTION

On May 12, 1978, the United States Court of Appeals for the Ninth Circuit in cause number 77-1999, affirmed the petitioner's judgment of conviction by the United States District Court for the District of Arizona, Phoenix, Arizona.

The petitioner submits that Title 28, United States Code, §1254(1) confers jurisdiction on this Court. Jurisdiction

is further based on Rule 19(1)(b), Supreme Court Rules, because the United States Court of Appeals for the Ninth Circuit has:

"(1) ... decided a federal question in a way in conflict with applicable decisions of this Court ... (and)

(2) ... rendered a decision in conflict with another Court of Appeals on the same matter; ..."

QUESTION PRESENTED FOR REVIEW

WHETHER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND RULE 405(b), FEDERAL RULES OF EVIDENCE, REQUIRE ADMISSION BY THE DEFENSE OF CHARACTER TESTIMONY RELATING TO SPECIFIC INSTANCES OF CONDUCT WHERE ENTRAPMENT IS RAISED AS A DEFENSE.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that:

"No person shall ... be deprived of life, liberty, or property without due process of law;..."

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that:

"In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor ..."

STATEMENT OF THE CASE

[Clerk's Record on Appeal will be referred to as "C.R.;" Reporter's Transcript of Proceedings will be referred to as "R.T."]

A. District Court Proceedings:

On February 22-25, 28, 1977, in the United States District Court for the District of Arizona, the Honorable Leo Brewster, Sitting by Designation, presiding, the petitioner was convicted following a jury trial of Counts IV, V and VI of an indictment charging him with a violation of Title 26 U.S.C. §5861(d) and §5871, and Title 18 U.S.C. §2, Possession of an Unregistered Firearm and Aiding and Abetting; and Title 28 U.S.C. §5861(i) and §5871, and Title 18 U.S.C. §2, Possession

of an Unserialized Firearm and Aiding and Abetting; and Title 26 U.S.C. §5861(e) and §5871, Transfer of a Firearm Without Filing a Written Application. (Indictment, C.R. 10-12; Verdicts, C.R. 169) On motion of the government, Counts I, II and III of the indictment were dismissed prior to trial. (C.R. 75-76)

On March 28, 1977, the petitioner was adjudged guilty as charged and committed to the custody of the Attorney General for a period of two years on each count, to run concurrently. The execution of sentence was suspended and the petitioner was placed on probation for a period of two years from the date of judgment. (C.R. 179)

On April 5, 1977, the petitioner filed his Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. (C.R. 180; Order Appointing Federal Public Defender as counsel on appeal, C.R. 187)

On May 12, 1978, the United States Court of Appeals for the Ninth Circuit affirmed the petitioner's conviction in an opinion attached hereto as Appendix I.

A Petition for Rehearing has been filed and is pending before the United States Court of Appeals for the Ninth Circuit.

B. Statement of Facts:

The petitioner proceeded to trial on Counts IV, V and VI of the indictment, which counts alleged that the petitioner unlawfully possessed and transferred a .22 Caliber Maxim silencer in violation of Title 26 U.S.C. §5861(d)(i)(e), §5871 and Title 18 U.S.C. §2. Each count involved the same .22 Caliber Maxim silencer.

At the conclusion of the government's case, which consisted of testimony from Edward J. Vercelli, a government informer and Daniel Ryan and Robert Scroggie, two special agents for the Bureau of Alcohol, Tobacco and Firearms (A.T.F.), the petitioner took the stand and presented an entrapment defense.

The defendant called four witnesses who testified or would have testified as to the following specific acts of conduct evidencing the petitioner's lack of predisposition to

violate firearm laws:

(1) As reflected in the offer of proof at R.T. III/222, the petitioner attempted to call Bob Short, a local law enforcement officer. Mr. Short would have testified that in September, 1975, two months prior to the petitioner's alleged gun violations, the petitioner voluntarily informed local law enforcement officers that an individual had attempted to sell him a truckload of weapons. The petitioner supplied the officers with information as to the serial numbers and types of weapons. Mr. Short determined that one such weapon was stolen. On October 29, 1975, the petitioner supplied Officer Short with information concerning a military machine gun smuggling ring out of Luke Air Force Base. Short turned this information over to the Bureau of Alcohol, Tobacco and Firearms for further investigation.

(2) The defense attempted to call Harry Koch, a detective for the Maricopa County Sheriff's Office. Koch would have testified that in 1975 he purchased weapons from a pawn shop in Phoenix, Arizona, where the petitioner had been employed on several occasions. Koch requested permission to step outside of the store to view the guns in the light. The petitioner, in compliance with federal regulations, always required Koch to sign a release form and purchase the weapon before leaving the store with the weapon. (R.T. III/219-221)

(3) The defense attempted to call John Adams, a special agent with the United States Customs Service, who would have testified that in July, 1974, the petitioner assisted him in the investigation of two neutrality violators who had illegally exported firearms purchased at the petitioner's pawn shop. (R.T. III/180)

(4) The defense attempted to call John Gannoway, a salesman at Arizona Shooters Supply. He would have testified that in 1975 he and the petitioner often discussed the possibility of obtaining automatic weapons -- potentially illegal weapons if not registered. The petitioner always stated that said weapons would be lawfully purchased and possessed.

The petitioner contended that the above-mentioned specific acts of conduct were admissible under Rule 405(b), Federal Rules of Evidence, as evidence of the petitioner's lack of predisposition to violate the gun laws. (R.T. III/219-220)

The District Court ruled that specific instances of conduct reflecting the petitioner's lack of predisposition are inadmissible even where entrapment is alleged as the defense.

(R.T. III/198)

In affirming the District Court, the Court of Appeals reasoned:

"If character or a trait of character is an essential element of the defense of entrapment, then the District Court should have admitted relevant testimony of specific instances of conduct [pursuant to Rule 405(b)]." (P. 2 of Appendix I)

However, the appellate court held:

"But character or a character trait is not an essential element of the entrapment defense. That defense has two elements -- a government official must have induced the defendant to commit the crime; and the defendant must not have been predisposed to commit the crime ... Neither element concerns character or a character trait." (Pp. 2-3 of Appendix I) (Emphasis added)

REASONS FOR GRANTING THE WRIT

THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND RULE 405(b), FEDERAL RULES OF EVIDENCE, REQUIRE ADMISSION BY THE DEFENSE OF CHARACTER TESTIMONY RELATING TO SPECIFIC INSTANCES OF CONDUCT WHERE ENTRAPMENT IS RAISED AS A DEFENSE.

At trial the petitioner raised the defense of entrapment. Specifically, the petitioner contended that a government undercover agent and his informer induced the petitioner into committing the alleged firearms offenses.

The Supreme Court has dealt with the defense of entrapment in three leading cases, each of which indicates that the crucial element of the defense is the accused's predisposition to commit the crime. Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958); United States v. Russell, 411 U.S. 423 (1973).

The courts have also held that entrapment is an affirmative defense. The defendant must come forward with evidence of his non-predisposition and government inducement. United States v. Demma, 523 F.2d 981, 985 (9th Cir., 1975); United States v. Hermosillo-Nanez, 545 F.2d 1230 (9th Cir., 1976), cert. denied, 429 U.S. 1050 (1977). Once the entrapment defense is put in issue, the government has the burden of establishing beyond a reasonable doubt that entrapment did not exist, i.e., the accused was predisposed to commit the violation. United States v. Glassel, 488 F.2d 143, 146 (9th Cir., 1973), cert. denied, 416 U.S. 941 (1974).

It is well settled law that once a defendant raises the issue of entrapment the prosecution may meet its burden of showing predisposition through inquiry into prior similar acts or convictions by the defendant. United States v. Ambrose, 483 F.2d 742 (6th Cir., 1973); Pulido v. United States, 425 F.2d 1391 (9th Cir., 1970); Whiting v. United States, 296 F.2d 512 (1st Cir., 1961). Prosecutors may also rely upon previous related misdemeanor or felony offenses for which the accused had neither been convicted nor arrested as evidence of predisposition. Carlton v. United States, 198 F.2d 795 (9th Cir., 1952).

This case raises the question of what type of evidence the defense may proffer to meet its initial burden in an entrapment defense by showing a lack of predisposition to commit the alleged offense. The District Court and Court of Appeals limited such proof to general opinion or reputation testimony concerning the petitioner's lack of predisposition to violate gun laws. Both courts specifically held that relevant testimony of specific instances of conduct were inadmissible to meet the initial showing of non-predisposition. (District Court -- R.T. III/181-182, 188, 198, 221; Court of Appeals -- Opinion, Appendix I, pp. 2-3) Rule 405(b), Federal Rules of Evidence, provides:

"(b) In cases in which character or a trait of character of a person is an essential element of a ... defense, proof may also be made of specific instances of his conduct."

One's character or predisposition to act in a certain way under specific circumstances is an essential element to the defense of entrapment. As defined in Frase v. Henry, 444 F.2d 1228 (10th Cir., 1977):

"Character' is a generalized description of one's disposition in respect to a general trait such as honesty, temperance or carefulness ... [It] designates a particular kind of situation with a certain type of conduct ..." Id. 1232 (Emphasis added)

At least three circuits have held that "character" is an essential element to the defense of entrapment. The Fifth Circuit in Accardi v. United States, 257 F.2d 168 (5th Cir., 1958), cert. denied, 358 U.S. 883 (1958), in applying the rationale of Sorrells v. United States, supra, and Sherman v. United States, supra, held:

"To determine whether entrapment has been established a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. This rationale throws the main emphasis on the 'predisposition' of the accused to commit the crime. We take it that 'predisposition' means something more than 'disposition' and is intended to refer to the character and intentions ^{1/} of the accused as an 'unwary innocent' ..." Id. 171 (Emphasis added)

The First Circuit in Whiting v. United States, 296 F.2d 512, 517 (1st Cir., 1961), has held that predisposition is a term which embraces both the character and intention of the defendant and can be proved through general reputation testimony or relevant prior conduct.

Finally, in an earlier discussion not cited in this case, the Ninth Circuit in United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir., 1977), recognized that the term predisposition as applied in entrapment defenses signifies a trait

1/ Predisposition as embodied in an entrapment defense includes the defendant's intent at the time of the commission of the act. Rule 404(b), Federal Rules of Evidence, sanctions the use of evidence of other acts to prove the intent of the accused. Therefore, alternatively, under Rule 404(b) the petitioner was entitled to offer the above-mentioned testimony concerning his similar prior acts to prove that he lacked the intent or predisposition to violate the gun laws.

of the accused's character:

"Sorrells and Sherman reveal a number of factors which must be considered in determining whether the defendant was a person 'otherwise innocent' in whom the Government implanted the criminal design. Among these are the character or reputation of the defendant, including any prior criminal record ..." Id. 1336 (Emphasis added)

As character is an essential element to the defense of entrapment, the Court of Appeals and District Court erred under Rule 405(b) in holding inadmissible the relevant testimony of specific instances of conduct concerning the petitioner's lack of predisposition to violate the gun laws. ^{2/} In so holding, the petitioner's rights to due process and a fair trial as embodied in the Fifth and Sixth Amendments to the Constitution of the United States were violated.

In Washington v. Texas, 388 U.S. 14, 19 (1967), this Court held:

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental right of due process of law. ^{3/}

^{2/} As discussed above, the prior acts which the petitioner attempted to have admitted into evidence were specifically limited to transactions involving firearms or law enforcement assistance in firearm investigations. All of the prior acts occurred within the same locale of Phoenix, Arizona, and within one year of the commission of the offenses alleged in the indictment.

^{3/} In Chambers v. Mississippi, 410 U.S. 284, 302 (1973), this Court held that "few rights are more fundamental than that of an accused to present witnesses in his own behalf".

In United States v. Melchor-Moreno, 536 F.2d 1042,

1046 (5th Cir., 1976), the Court stated:

"Despite the limitations of its wording, the [Sixth] Amendment is held to embrace not only the right to bring witnesses to the courtroom, but also, in appropriate circumstances, the right to put them on the stand. As the Court in Washington said, '[t]he framers of the constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use'."

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit prohibiting testimony of prior similar acts where entrapment is raised as a defense violated the petitioner's Fifth Amendment right to due process and Sixth Amendment right to a fair trial as well as Rule 405(b), Federal Rules of Evidence. In addition, the appellate court's decision conflicts with decisions of this Court, the First and Fifth Circuits and a prior decision of the Ninth Circuit. For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition and issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and to thereafter reverse his conviction and order a new trial.

Respectfully submitted: June 8, 1978.



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Attorney for Petitioner

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-v-

UNITED STATES OF AMERICA

AFFIDAVIT OF SERVICE

THOMAS W. O'TOOLE, Federal Public Defender, being first duly sworn, upon his oath, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served one copy of the following documents on the United States Attorney for the District of Arizona, Phoenix, Arizona 85025; and has forwarded by mail, two copies of the same to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 8th day of June, 1978:

- (1) Motion for Leave to Proceed in Forma Pauperis;
- (2) Petition for Writ of Certiorari to the Supreme Court of the United States;
- (3) Affidavit of Service.

Thomas W. O'Toole
THOMAS W. O'TOOLE
Federal Public Defender
District of Arizona

SUBSCRIBED AND SWORN to before me this 8th day of June, 1978, by Thomas W. O'Toole.

Marcia D. Handuso
Notary Public

My Commission Expires: June 14, 1981.

1 UNITED STATES COURT OF APPEALS
2 EMILE MELFI, JR.
3 CLERK, U.S. COURT OF APPEALS
4 FOR THE NINTH CIRCUIT

5 UNITED STATES OF AMERICA,)
6 Appellee,) NO. 77-1999
7 vs.)
8 BENSON JOSEPH DONOHO,) OPINION
9 Appellant.)

10 Appeal from the United States District Court
11 for the District of Arizona
12 Before: BARNES and CHOY, Circuit Judges, and LYDICK,*
13 District Judge

14 PER CURIAM:

15 Appellant was convicted of Counts Four, Five and
16 Six of a six-count indictment. In Count Four, he was charged
17 with violation of 26 U.S.C. §5861(d) (possession of unregis-
18 tered firearm); in Count Five with violation of 26 U.S.C.
19 §5861(i) (possession of an unserialized firearm); and in
20 Count Six with violation of 26 U.S.C. §5861(e) (transfer of
21 firearm without written application). In each count, 26
22 U.S.C. §5871 was charged to establish the penalty for the
23 crimes, and 18 U.S.C. §2 was also added to Counts Four and
24 Five to charge the aiding and abetting of the alleged crime.
25 During the course of the trial, the Court dismissed the first
26 three counts of the indictment and renumbered the last three
27 as Counts One, Two and Three. All counts related to the
28 possession or transfer of a .22 caliber Maxim silencer on
29 November 17, 1975.

30 This Court has jurisdiction of this appeal under
31

32 *The Honorable Lawrence T. Lydick, United States District
Judge, Central District of California, sitting by designation.

1 28 U.S.C. §1291.

2 Appellant presents three issues for our review:

3 1. Did the District Court err in excluding char-
4 acter testimony relating to specific instances of appellant's
5 conduct?

6 2. Did the District Court err in denying defen-
7 dant's motion for judgment of acquittal based on the "pro-
8 curing agent" theory? and

9 3. Did the District Court err in allowing the
10 Government to impeach the defendant by proof of a prior
11 misdemeanor theft conviction?

12 I

13 CHARACTER EVIDENCE

14 The defense attempted to establish defendant's
15 character by introducing testimony of specific instances of
16 conduct which would have reflected favorably on appellant.
17 The trial court ruled such testimony inadmissible. Whether
18 that decision was correct depends upon the application of
19 FED. R. EVID. 405(b) to the facts of this case.

20 Rule 405(b) provides that "[i]n cases in which
21 character or a trait of character of a person is an essential
22 element of a charge, claim, or defense, proof may . . . be
23 made of specific instances of conduct." At trial appellant
24 raised the defense of entrapment. If character or a trait
25 of character is an essential element of the defense of en-
26 trapment, then the District Court should have admitted
27 relevant testimony of specific instances of conduct.

28 But character or a character trait is not an
29 essential element of the entrapment defense. That defense
30 has two elements: a government official must have induced
31 the defendant to commit the crime; and the defendant must

1 not have been predisposed to commit the crime. Hampton v.
2 United States, 425 U.S. 484 (1976); United States v. Russell,
3 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369
4 (1958); Sorrells v. United States, 287 U.S. 435 (1932).
5 Neither element concerns character or a character trait. The
6 inducement concerns actions taken by persons other than the
7 defendant, and the predisposition concerns the defendant's
8 state of mind prior to the inducement.

9 We recognize that proof of character may be rele-
10 vant to the entrapment defense because it may make more
11 probable than not that a defendant possessed a certain state
12 of mind. It is the state of mind itself, however, and not
13 the method of proving the state of mind, which operates as
14 an essential element of the defense. Moreover, predisposi-
15 tion may be shown by methods other than proof of character,
16 including proof of prior similar conduct and convictions for
17 prior similar conduct. Whiting v. United States, 296 F.2d
18 512 (1st Cir. 1961), cert. denied 375 U.S. 884 (1963);
19 Carlton v. United States, 198 F.2d 795, 797 (9th Cir. 1952);
20 Pulido v. United States, 425 F.2d 1391, 1393-94 (9th Cir.
21 1970); but see United States v. McClain, 531 F.2d 431, 435-
22 437 (9th Cir.), cert. denied 429 U.S. 835 (1976) (hearsay
23 testimony inadmissible to show predisposition in the absence
24 of exception to the hearsay rule). Because proof can be
25 made by several methods, character is not even an essential
26 method of proof, much less an essential element of the de-
27 fense itself.

28 Even if character were an essential element of an
29 entrapment defense, proof of character would still be subject
30 to the restraints of relevance. United States v. Ambrose,
31 483 F.2d 742, 748 (6th Cir. 1973). Much of the testimony
32 concerning specific acts of the defendant was remote and the

District Court was well within its discretion in ruling it not relevant. The jury was properly instructed as to the elements of entrapment and reasonably could have concluded that there was none here. United States v. Gonzales-Benitez, 537 F.2d 1051 (9th Cir.), cert. denied 429 U.S. 923 (1976). We find no error in the District Court's ruling as to the character evidence.

11

THE "PROCURING AGENT" THEORY

Appellant next urges that the trial court should have acquitted him because he acted only as an agent in procuring the illegal firearms and delivering them to another person. We disagree.

In Vasquez v. United States, 290 F.2d 897, 898 (9th Cir. 1961), we recognized the Third Circuit's decision, United States v. Prince, 264 F.2d 850 (3d Cir. 1959), that a procuring agent for a purchaser could not be convicted of a sale of heroin. However, we declined there to decide whether the same rule applied to a charge of facilitating the sale of heroin, and found no reversible error despite the procuring agent theory urged by the defendant. Later, the procuring agent theory was specifically rejected by this Court in United States v. Hernandez, 480 F.2d 1044 (9th Cir. 1973) insofar as the distribution of controlled substances is concerned, this Court noting that the law of this Circuit provides that a procuring agent properly may be convicted of facilitation of transfer or sale. *Id.* at 1046-1047.

Counts One and Two here deal only with the possession of a certain type of firearm and not the sale, transfer or delivery thereof. Because the prosecution clearly established the elements of possession, United States v. Freed,

401 U.S. 601 (1971), the procuring agent theory could apply only to Count Three. Inasmuch as the sentences on the three counts were identical and to run concurrently, the alleged error would be harmless because it could not affect or control the convictions for the first two counts. In any event the trial court properly submitted the third count to the jury because appellant could have been convicted on that count as a procuring agent. Furthermore, the jury reasonably could have concluded that appellant was not merely a procuring agent. For all these reasons, the trial court did not err in denying the motion for judgment of acquittal.

III

PRIOR MISDEMEANOR CONVICTION

Appellant last urges that the Government's use of a prior misdemeanor conviction to impeach his testimony constituted reversible error. The conviction was for petty theft, which involved the taking of a gun from his employer in 1971.

The governing rule is FED. R. EVID. 609(a) which provides:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment."

Most crimes involve dishonesty, but dishonesty has assumed a special meaning in the context of FED. R. EVID. 609(a). It refers to the inclination not to tell the truth.

1 Conviction of crimes such as perjury, false statement, fraud,
2 embezzlement or false pretense suggest that the witness, once
3 having deceived, lied, or falsified, may do so again. House-
4 Senate Conference Committee Notes to Federal Rule of Evidence
5 609; United States v. Ortega, 561 F.2d 803 (9th Cir. 1977).
6 Accordingly, convictions for those types of crimes, even
7 though they may be misdemeanors, properly may be used to
8 impeach a witness.

9 Appellant's prior conviction was for the violation
10 of 5 Ariz. Rev. Stats. §§13-661, 13-663B, and 13-661B.
11 Section 13-661 includes as one of the categories of theft
12 the knowing and designing defrauding of a person of money,
13 labor or property through any false or fraudulent representa-
14 tion or pretense. Section 13-661B provides that "[a]ny
15 false or fraudulent representation or pretense shall be
16 treated as continuing so as to include any money, property
17 or service received as a result thereof. . . ." The inclus-
18 ion of section 13-661B in the conviction makes it clear that
19 appellant's theft was based on a false and fraudulent repre-
20 sentation or pretense, notwithstanding that the value of the
21 article stolen made the theft classified as petty (§13-663B).
22 The prior conviction therefore was for a crime which involved
23 dishonesty as that term is used in FED. R. EVID. 609(a).
24 The District Court did not err in admitting the evidence of
25 the prior conviction.

26 The judgment of the District Court is AFFIRMED.
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No. 77-6910

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SEP 5 1978

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

BENSON JOSEPH DONOHO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-6910

BENSON JOSEPH DONOHO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. I) is reported at 575 F.2d 718.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1978. A petition for rehearing was denied on July 13, 1978. The petition for a writ of certiorari was filed on June 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, whose defense was based on entrapment, should have been permitted to introduce evidence of specific past acts of good conduct to demonstrate that he lacked a predisposition to commit the offense.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on three

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counts of unlawfully possessing and transferring a firearm, in violation of 26 U.S.C. 5861(d) and (e). Petitioner was sentenced to concurrent terms of two years' imprisonment on each count; execution of the prison sentence was suspended and petitioner was placed on probation for a period of two years.
^{1/}
The court of appeals affirmed (Pet. App. I).

The evidence at trial showed that in September 1975 Edward Vercelli, a friend of petitioner, notified law enforcement officials of his suspicion that petitioner was engaged in illegal sales of unregistered firearms. In early October, at the government's request, Vercelli introduced petitioner and his co-defendant, Edward Cocchiola, to Daniel Ryan, an undercover agent assigned to the Bureau of Alcohol, Tobacco, and Firearms (I Tr. 26). In a conversation that occurred in petitioner's presence, Cocchiola told Ryan that he had a Maxim silencer for sale (I Tr. 36, II Tr. 46-47). Subsequently, petitioner advised Ryan that the Maxim silencer was available at his house and that Vercelli and Cocchiola were there also (II Tr. 53). Ryan agreed to meet with petitioner to consummate the sale (II Tr. 53-54). Later that day, Ryan met petitioner at Vercelli's home where petitioner sold Ryan the silencer for \$200 (II Tr. 54-55, Gov't. Exh. 1).

Vercelli testified that Cocchiola had previously delivered the silencer to petitioner (I Tr. 35) and that he and petitioner were offered a 10 percent commission by Cocchiola for any firearms they sold to Ryan (I Tr. 38). It was further shown that neither petitioner nor Cocchiola had a Maxim silencer registered in their names or any pending applications for registration (II Tr. 58).

^{1/} Petitioner's co-defendant, Salvatore Edward Cocchiola, was convicted on the same counts and received an identical sentence. He did not appeal his conviction.

Petitioner testified on his own behalf and presented an entrapment defense. Petitioner stated that, at the time of the offenses involved in this case, he was employed at a jewelry store where his regular duties included the sale of firearms and ammunition (II Tr. 208). Petitioner testified that he was aware of the firearms registration requirements (id. at 210-211), and that he had never knowingly violated them in the sale of a weapon (III Tr. 57). Petitioner stated that when Vercelli attempted to involve him in unlawful firearms sales he had initially resisted him, but that his resistance was eventually overborne by Vercelli's persistence, appeals to their friendship, and apparent need for the money (II Tr. 217-248, III Tr. 5-52). Petitioner's testimony was corroborated by his wife (III Tr. 141-164).

Petitioner also sought to establish his lack of predisposition to commit the firearms offense through the testimony of four other witnesses. John Adams, a special agent with the United States Customs Service, testified that petitioner appeared as a government witness in a 1974 prosecution of two firearms violators (III Tr. 180). The court would not allow further examination of Mr. Adams, ruling that petitioner's voluntary cooperation in the previous firearms prosecution was irrelevant (III Tr. 182). John Gannoway, a firearms salesman and acquaintance of petitioner, testified that in his gun dealings with petitioner over the prior three years petitioner had always acted honestly and legally (III Tr. 188). Jody Numbers, a gun collector and acquaintance of petitioner, testified that in all of their personal contacts petitioner never indicated any desire or willingness to obtain illegal guns (III Tr. 191). He further stated that, in his opinion, petitioner was trustworthy and honest (III Tr. 193). Finally, Harry Koch, a local police detective, stated that

he believed petitioner to be above reproach with respect to his honesty and legality in firearms sales (III Tr. 197).

Petitioner also sought to introduce, through these witnesses, evidence of his specific past conduct to show that he lacked the predisposition to deal in unregistered firearms. The court refused to allow petitioner to introduce such evidence at trial (III Tr. 183, 188, 192, 197-198) but allowed petitioner to make an offer of proof out of the presence of the jury. According to petitioner's offer of proof, Koch would have testified that petitioner strictly abided by federal regulations and required customers to complete registration forms before he would even allow guns to be removed from the store for examination (III Tr. 220-221). Gannoway and Numbers would have testified that in past discussions about illegal weapons, petitioner never indicated that he was involved in unlawful trafficking, purchasing, or selling (III Tr. 221). Lastly, Gannoway and an additional witness, Bob Short, whose testimony was previously held to be inadmissible (III Tr. 182-183), would have stated that in late September 1975, when petitioner was offered the opportunity to purchase a truckload of illegal weapons, petitioner contacted law enforcement officers and provided them with information concerning the serial numbers and types of weapons that had been offered. According to the offer of proof, Short would also have testified that in October 1975 petitioner contacted him and provided him with information concerning individuals who were smuggling military machine guns out of a local Air Force Base, and that this information was ultimately turned over to the Bureau of Alcohol, Tobacco, and Firearms (III Tr. 222-223). Despite the offer of proof, the trial court adhered to its original ruling that specific acts of law-abiding conduct were inadmissible (III Tr. 198, 222).

The court of appeals affirmed (Pet. App. 1-6).

DISCUSSION

Petitioner contends that the trial court erred in excluding evidence of prior acts of good conduct offered by petitioner to establish that he lacked a predisposition to commit the offense.

1. The defense of entrapment involves two separate factual enquiries: (1) whether the crime was initiated or induced by the government, and (2) if there was inducement, whether the defendant was nevertheless predisposed to commit the act without any persuasion. The burden is on the defendant to come forward with evidence to show that the offense was induced by government action; once he has done so, it is then the government's burden to prove that the defendant was nonetheless predisposed to commit the offense. United States v. Steinberg, 551 F.2d 510, 513-514 (C.A. 2); United States v. Hermosillo-Nanez, 545 F.2d 1230, 1232 (C.A. 9), certiorari denied, 429 U.S. 1050; United States v. Pickle, 424 F.2d 528, 529 (C.A. 5); Sagansky v. United States, 358 F.2d 195, 203 (C.A. 2), certiorari denied, 385 U.S. 816.^{2/} Since government inducement is not of itself improper, Sorrells v. United States, 287 U.S. 435, 451, the entrapment defense is primarily concerned with the defendant's predisposition to commit the offense. Hampton v. United States, 425 U.S. 484, 488; United States v. Russell, 411 U.S. 423, 429.

The court of appeals ruled in this case that a defendant may not seek to prove that he lacked predisposition by intro-

^{2/} The cases differ somewhat on the quantum of proof required on the question of inducement, whether the defendant must simply "come forward" with evidence of inducement (United States v. Hermosillo-Nanez, supra; Sagansky v. United States, supra), or prove it by a preponderance of the evidence (United States v. Steinberg, supra).

ducing evidence of his specific prior acts of good conduct. The court characterized such evidence as proof of "character" and therefore considered the case to be controlled by Rule 405(b) of the Federal Rules of Evidence, which allows proof of character by "specific instances of * * * conduct" only when "character or a trait of character of a person is an essential element of a charge, claim, or defense * * *." The court agreed that character is "relevant to the entrapment defense because it may make more probable than not that a defendant possessed a certain state of mind" and that proof of the defendant's character by reputation or opinion is admissible to show lack of predisposition under Rule 405(a) of the Federal Rules of Evidence (Pet. App. 3).^{3/} But the court held that specific acts of good conduct may not be proven under Rule 405(b) since character is not an "essential element" of the defense of entrapment, reasoning that "predisposition concerns the defendant's state of mind prior to the inducement" rather than his character (ibid.).

Decisions in this Court and in other courts of appeals have adopted a broader view of the nature of the inquiry concerning "predisposition." In Sorrells v. United States, supra, this Court did not limit the question of "predisposition" to a search for the defendant's "state of mind" at the time of the inducement. The Court stated that the "controlling question" is whether "the defendant is a person otherwise innocent" who has been induced by the government to participate

^{3/} Fed. R. Evid. 405(a) provides:

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

4/ in the criminal conduct. 287 U.S. at 451. See also Sherman v. United States, 356 U.S. 369, 371; Palido v. United States, 425 F.2d 1391, 1393 (C.A. 9); Whiting v. United States, 296 F.2d 512, 516 (C.A. 1). Other courts have held specifically that "predisposition" is a term which embraces the defendant's "character" as well as his immediate intentions, and that proof of predisposition may thus be made either through reputation or opinion evidence or by evidence of relevant prior conduct. Whiting v. United States, *supra*; Acardi v. United States, 257 F.2d 168, 171 (C.A. 5), certiorari denied, 358 U.S. 883. See also United States v. Reynoso-Ulloa, 548 F.2d 1329 (C.A. 9). It would appear to follow from these cases that a defendant's character, or a specific trait of his character, ^{5/} is "an essential element" of the defense, and that evidence of specific relevant instances of conduct is therefore admissible under Rule 405(b).

But it ultimately makes no difference whether relevant instances of conduct are admissible to prove character under Rule 405(b). The conclusion that evidence of specific conduct may not be offered to prove "character" does not dispose of the possibility that the evidence is admissible for other purposes. ^{6/} Thus, it is well settled that when a defendant

4/ In Sorrells, the Court stated that the evidence to be adduced when the defense of entrapment is raised includes "an appropriate and searching inquiry into the [defendant's] conduct and predisposition as bearing upon that issue." 287 U.S. at 451.

5/ I.e., the defendant's integrity and honesty in dealing in transactions of the type involved in the criminal trial.

6/ Indeed, Rule 404(b) of the Federal Rules of Evidence specifically authorizes proof of "other crimes, wrongs or acts" for "purposes * * * such as proof of motive, opportunity, intent, preparation, plan, knowledge, * * * or absence of mistake or accident." If the government were per-

[Continued]

raises the issue of entrapment the government may prove specific instances of prior criminal activity to show that the defendant possessed a state of mind or intent suggesting his predisposition to commit the offense. See United States v. Watkins, 537 F.2d 726, 827 (C.A. 5) (citing cases); United States v. Ambrose, 483 F.2d 742, 748 (C.A. 6); United States v. Brown, 453 F.2d 101, 107-108 (C.A. 8), certiorari denied, 405 U.S. 978. The only constraints on the use of such evidence are that it must be relevant and not outweighed by any danger of confusion or unfair prejudice, or unduly burdensome or repetitious. Fed. R. Evid. 402, 403; see United States v. Ambrose, *supra*, 483 F.2d at 748. Accordingly, even under the analysis adopted by the court of appeals in this case (Pet. App. 3), evidence of specific prior acts of conduct should be admitted if it is relevant to prove the defendant's "intent" or "state of mind."

Like considerations suggest that specific acts of good conduct can be relevant to showing lack of predisposition. To be sure, even a person whose moral record is unblemished may harbor a criminal predisposition. But that reality bears on the weight of such evidence rather than on its relevance in a particular case. Evidence is "relevant" when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. While evidence that a person with many prior opportunities had never committed a crime may have little or no bearing on whether he committed the crime on the precise

mitted to rely on this Rule to introduce relevant "bad" acts of conduct bearing on "intent" but the defendant were precluded from using the Rule to prove relevant "good" acts of conduct bearing on the same issue, a question of constitutional fairness under the Fifth and Sixth Amendments would conceivably be raised.

occasion charged in the indictment, see United States v. Shapiro, 159 F.2d 890 (C.A. 2), affirmed, 335 U.S. 1, such evidence may nonetheless be relevant to the question whether the defendant's prior conduct reveals that he possessed a predisposition to commit the offense on the single occasion when the government induced his participation.

It is true, of course, that evidence of prior misconduct has a greater "logical solidity" ^{7/} toward establishing a defendant's improper disposition than evidence of good conduct has in negating that disposition. Even a hardened criminal would not be likely to accept every available opportunity for criminal conduct. Moreover, evidence of good conduct could often wander far afield from the precise question of predisposition to be determined at trial. A trial court should thus carefully scrutinize proffered evidence of good conduct to determine whether it is sufficiently proximate in time and nature to the alleged offense, and sufficiently unambiguous, that it can be said to bear meaningfully on the defendant's lack of a criminal disposition at the time of the government's inducement. Evidence that is repetitious, misleading, or confusing should, of course, be refused. The court's determination as to the admissibility of such evidence would involve a complex and inherently factual assessment of the significance of the evidence in the context of a particular case, and would be subject to reversal only for the clearest abuse of discretion. See United States v. Catalano, 491 F.2d 268 (C.A. 2), certiorari denied, 419 U.S. 825.

2. The court of appeals concluded that, even assuming that prior acts of good conduct may in some contexts be admissible to show a defendant's lack of predisposition,

^{7/} Whiting v. United States, supra, 296 F.2d at 516.

"[m]uch of the testimony concerning specific acts of the defendant was remote and the District Court was well within its discretion in ruling it not relevant" (Pet. App. 3-4). With regard to the testimony offered by witnesses Koch (specific legal weapons transaction; III Tr. 220-221), Gannoway (conversations concerning legal weapons transactions; III Tr. 221); and Numbers (same; III Tr. 221), the district court ruled specifically that the evidence was not "relevant as to time, place and anything else" (III Tr. 222). The exclusion of this evidence on grounds of remoteness seems well within the discretion of the district court.

The district court did not, however, make a similar determination with regard to the testimony offered by witness Short. This witness would have testified that on two occasions, during the precise period of the offense proven at trial, the defendant became aware of planned illegal weapons transactions, reported the incidents to law enforcement officials, and assisted in the official investigations (III Tr. 222-223). One of the incidents involved a purported attempt to sell a "truck load of weapons" and the other involved the smuggling of machine guns out of a nearby Air Force base (ibid.). The petitioner's attorney stated that (ibid.):

The purpose of this testimony, Your Honor, is to show that at the very time when the Government is alleging that Mr. Donoho was conspiring to sell the illegal weapons, he was, in fact, voluntarily assisting the government. * * * We think that it shows that he did not have a predisposition to commit these crimes.

The district court did not reject this evidence on the ground that it was remote. Instead, the court stated that the evidence seemed inconsistent with the fact that petitioner had not reported other illegal weapons activity and that, in any

event, the evidence was "not admissible" (III Tr. 224). Since the court did not explain its ruling, it is unclear why the court rejected the evidence. It cannot be said from the trial transcript whether the district court was exercising its discretion to exclude the evidence under Rule 403, or was instead of the view (adopted by the court of appeals) that the court had no discretion because evidence of specific conduct was inadmissible under Rule 405(b).

8/ Since the court did not base its ruling on an exercise of its discretion under Rule 403, it is the view of the United States that this evidence should have been allowed at trial. The evidence offered in this case -- that the petitioner not only declined to take advantage of contemporaneous opportunities to commit similar offenses, but also reported the incidents to police officers and assisted in their subsequent investigation -- would seem to constitute a paradigm of the narrow context in which evidence of prior good conduct bears meaningfully on the defendant's lack of predisposition to commit the crime charged. The evidence was close in time, similar in nature, and unequivocal in content. In these special circumstances, we believe the proffered evidence of good conduct might properly have been admitted in the discretion of the trial court. Since it does not appear that the court exercised its discretion in rejecting this evidence, we must conclude that the ruling of the district court was in error.

Nor can we say that this evidence was of only limited probative value and that its exclusion was harmless error. Peti-

8/ When the court first excluded evidence of specific acts at the trial, the court noted that the witness was appearing "as a character witness" (III Tr. 181). Petitioner's attorney argued that proof of specific acts was admissible in this case under Rule 405(b) because the petitioner's honesty in gun dealings was a character trait that was an essential element of petitioner's entrapment defense (III Tr. 220). The court did not comment on this contention.

tioner's defense was predicated wholly on the theory of entrapment. While petitioner was allowed to introduce opinion and reputation evidence as to his good character, see pp. 3-4 and 6, supra, the evidence of his cooperation with law enforcement officers at the time of the events proven at trial was likely to have received serious consideration by the jury. We therefore agree that petitioner is entitled to a new trial in this case.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court either for reconsideration in light of the position now taken by the United States or with instructions that the district court's judgment be vacated and the case be remanded to that court for a new trial.

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